

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH BONGIOVANNI,

Defendant.

Case No. 1:19-cr-227
(LJV)

February 28, 2024

TRANSCRIPT EXCERPT - PROFFER OF PETER MILITELLO
WITH NO JURY PRESENT
BEFORE THE HONORABLE LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

TRINI E. ROSS, UNITED STATES ATTORNEY
BY: JOSEPH M. TRIPI, ESQ.
NICHOLAS T. COOPER, ESQ.
CASEY L. CHALBECK, ESQ.

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And

UNITED STATES DEPARTMENT OF JUSTICE
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For the Plaintiff

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And
LAW OFFICES OF PARKER ROY MacKAY
BY: PARKER ROY MacKAY, ESQ.
3110 Delaware Avenue
Kenmore, New York 14217
For the Defendant

PRESENT:

BRIAN A. BURNS, FBI Special Agent
MARILYN K. HALLIDAY, HSI Special Agent
KAREN A. CHAMPOUX, USA Paralegal

JUDITH A. KUBINIEC, ESQ.
Attorney for Peter Militello

LAW CLERK: REBECCA FABIAN IZZO, ESQ.

COURT DEPUTY CLERK: JANE D. KELLOGG

COURT REPORTER: ANN MEISSNER SAWYER, FCRR, RPR, CRR
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* * * * *

(Excerpt commenced at 3:40 p.m.)

(Jury not present.)

THE CLERK: We are back on the record for the
continuation of the jury trial in 19-cr-227, United States of
America versus Joseph Bongiovanni.

All counsel and parties are present.

THE COURT: Okay. Anything we need to do before we
bring the witness in and do a little proffer?

MS. CHALBECK: I don't believe so, Your Honor.

MR. SINGER: I guess the only question I had, Judge,
is with regard to procedure.

So Mr. MacKay and I were talking, and it was a little
unclear to us how this is going to work. I know it's outside
the presence of the jury, and that's our preference. But when
I've seen this done in the past is that the witness is brought
out before any type of warning's issued by the Court, there

1 has to be some attempt at questioning to figure out if he's
2 gonna answer or not. And then if he wants to seek advice from
3 counsel, go ahead and do that. And then, you know, if it's
4 persistent, you give the warning. And then what happens after
5 that, happens after that.

6 But I just wanted to see if all of us are on the same
7 page about that.

8 **THE COURT:** Yeah, that's certainly what I
9 contemplated.

10 **MS. CHALBECK:** Yes, Your Honor.

11 **THE COURT:** Great. Yeah.

12 **MR. SINGER:** That's all I have, Judge.

13 **THE COURT:** Yep.

14 **MS. IZZO:** I just texted Lee, so he should be on his
15 way up.

16 **MS. CHALBECK:** Your Honor, I would note that counsel
17 for the witness is present in the courtroom --

18 **THE COURT:** Yep.

19 **MS. CHALBECK:** -- sitting on the back bench. Thank
20 you.

21 **THE COURT:** I see her.

22 Ms. Kubiniec, have you spoken with him today?

23 **MS. KUBINIEC:** Yes, Your Honor, on lunch break.

24 **THE COURT:** I'm sorry?

25 **MS. KUBINIEC:** While the Court was on lunch break.

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THE COURT: Great.

(Peter Militello seated at 3:47 p.m.)

THE COURT: Okay. Ms. Kellogg, you can swear in the

P E T E R M I L I T E L L O, having been duly called and sworn, testified as follows:

THE COURT: Will you state your name, sir, and spell your first and last name, please?

THE WITNESS: Your Honor, with all due respect, I ain't answering no question.

THE COURT: Okay. Well, what I'd like you to do -- I mean, look it, while you're in my courtroom, first of all, you're going to be treated with all the respect that you deserve, and I hope that you will extend that same respect to me, because I've got a job to do.

THE WITNESS: Absolutely.

THE COURT: So I'd like you to state and spell your first and last name for the record right now. Will do you that for me?

THE WITNESS: Peter Militello, P-E-T-E-R
M-I-L-I-T-E-L-L-O.

THE COURT: Thank you. And you understand that you've now been put under oath; is that right?

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THE WITNESS: Yeah, I understand, Your Honor.

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THE COURT: Okay. And your lawyer is here in the

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courtroom; do you see her?

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THE WITNESS: Yeah, I see her.

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THE COURT: Okay. So now you're going to be asked

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some questions, and if I feel as though you should answer

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those questions, I'm going to direct you to answer them.

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If I think that you have a reason not to answer them

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because the question calls for privileged information or

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information that might incriminate you, then I will allow you

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not to answer. Okay?

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Okay. So, let's proceed.

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MS. CHALBECK: Thank you, Your Honor.

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PROFFER QUESTIONS BY MS. CHALBECK:

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Q. The government only has three questions.

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The first question: Were you ever an informant for

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Joseph Bongiovanni?

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A. (No response.)

03:49PM

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THE COURT: Ms. Kubiniec, is there any reason he

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should not answer that question?

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Come up, Ms. Kubiniec, you can come right up to the

03:49PM

23

podium here. Thank you, and I appreciate it.

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24

Is there -- is there a Fifth Amendment reason why he

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should not answer that question?

03:49PM 1 **MS. KUBINIEC:** To the best of my knowledge, no,
03:49PM 2 Your Honor.

03:49PM 3 **THE COURT:** I'm going to direct you to answer that
03:49PM 4 question, please, sir.

03:49PM 5 **THE WITNESS:** (No response.)

03:49PM 6 **THE COURT:** Are you refusing to answer, even though
03:49PM 7 I'm directing you to answer the question?

03:49PM 8 **THE WITNESS:** With all due respect, Your Honor, I
03:49PM 9 never agreed to cooperate with the government. I'm not gonna
03:49PM 10 answer any questions here today.

03:49PM 11 **THE COURT:** No, we understand that. We understand
03:49PM 12 that you've not agreed --

03:49PM 13 **THE WITNESS:** I'm not gonna answer the questions,
03:49PM 14 because if I answer the questions, I'm gonna be assisting the
03:50PM 15 government. And I never agreed to cooperate or assist the
03:50PM 16 government in any way, shape, or form. I'm here under a
03:50PM 17 subpoena.

03:50PM 18 **THE COURT:** We understand.

03:50PM 19 **THE WITNESS:** I didn't come here willingly,
03:50PM 20 Your Honor, so I'm not gonna answer no questions.

03:50PM 21 With all due respect to the Court --

03:50PM 22 **THE COURT:** I understand, and I appreciate that. But
03:50PM 23 I want you to understand that people -- the subpoena requires
03:50PM 24 you to come in, right?

03:50PM 25 **THE WITNESS:** And I'm here.

03:50PM 1 **THE COURT:** And you are, and I appreciate that.

03:50PM 2 And so now, I have the authority to require you to
03:50PM 3 answer. Now obviously I can't, you know, force you. But
03:50PM 4 under the law, I have the authority to require you to answer
03:50PM 5 questions that I think you should answer.

03:50PM 6 You are not cooperating with the government. You're
03:50PM 7 not helping anybody by doing anything. You are simply doing
03:50PM 8 what the law requires you to do.

03:50PM 9 **THE WITNESS:** And it's also my constitutional right
03:50PM 10 to remain silent.

03:50PM 11 **THE COURT:** But not unless what you say can be used
03:50PM 12 against you to prosecute you. So if -- and that's why your
03:51PM 13 lawyer's here. Your lawyer's here to protect that right.

03:51PM 14 You're right, you have the right to remain silent
03:51PM 15 and --

03:51PM 16 **THE WITNESS:** But if I answer the question, I'll be
03:51PM 17 assisting the government; am I right or wrong?

03:51PM 18 **THE COURT:** Well, you'll be doing what you're
03:51PM 19 required to do.

03:51PM 20 **THE WITNESS:** I'm not a stoolie, Your Honor. I'm not
03:51PM 21 answering no questions on the stand. I just ain't doing it.
03:51PM 22 I'll deal with the consequences, whatever they may be.

03:51PM 23 **THE COURT:** There might be consequences to you as a
03:51PM 24 result of that; do you understand that?

03:51PM 25 **THE WITNESS:** I understand, Your Honor.

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1

THE COURT: Okay.

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THE WITNESS: I understand. I fully understand.

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3

THE COURT: Okay. So, ask your next question.

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BY MS. CHALBECK:

03:51PM

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Q. Mr. Militello, did the defendant, Joseph Bongiovanni,
arrest you?

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A. (No response.)

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THE COURT: I'm going to direct you to answer that
question.

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THE WITNESS: (No response.)

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THE COURT: Are you refusing to answer that question
despite my direction?

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You can answer my question. Are you refusing to
answer the question despite my direction?

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THE WITNESS: Yes, Your Honor.

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THE COURT: Thank you.

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Next question.

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BY MS. CHALBECK:

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Q. Are you serving 30 years in prison in connection with the
defendant's arrest of you?

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A. (No response.)

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THE COURT: Okay. And I'm going to direct you to
answer that question.

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THE WITNESS: (No response.)

03:52PM

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THE COURT: Are you refusing to answer that question

despite my direction?

THE WITNESS: With all due respect, yes, Your Honor.

THE COURT: Okay.

MS. CHALBECK: I don't have any further questions, Your Honor. If the government may have a moment just to confer as to what we would request.

THE COURT: Sure.

And you can take the witness back. Keep him on this floor, though, for the time being.

(Peter Militello exited courtroom at 3:53 p.m.)

MS. CHALBECK: Your Honor, I understand that the witness just exited the courtroom. The government would ask that he be directed one more time to answer the questions that the government issued to him.

In the event that he continues to refuse, the government would ask the Court to hold him in civil contempt under Title 18, United States Code, Section 1826, that's the recalcitrant witness statute, and that the witness be instructed that that time which, per the statute, will run through the duration of the judicial proceeding in this trial will be in addition to his 30-year prison sentence. And moreover, should he continue to refuse to testify as required by law, he could be held in criminal contempt, and that time would run consecutive to any prison sentence as well.

MR. SINGER: I mean, Judge, I -- obviously, you've

1 got to do what you've got to do in this situation.

2 I'm not going to speak on behalf of Mr. Militello
3 because Ms. Kubiniec is here to do that. But bringing him
4 back in here and asking him to answer questions again is just
5 a waste of time. We're already behind in this trial. I think
6 we just need to move things along, proceed with your warnings,
7 and the government can do what they need to do with this
8 witness, and we'll move on to the next one.

9 **THE COURT:** I think we ought to at least let him know
10 that -- I mean, I told him there might be consequences. I
11 think we ought to at least let him know what those
12 consequences might be.

13 **MR. SINGER:** I don't have any objection to that,
14 Judge. I just don't think that reasking the same questions is
15 gonna get us anywhere.

16 **THE COURT:** I don't either, but I think it's at least
17 worth a shot.

18 Okay. Bring him back in. Sorry, guys.

19 (Peter Militello seated at 3:55 p.m.)

20 **THE COURT:** Sit down, Mr. Militello.

21 Before we let you go, I want to make sure you
22 understand what the consequences might be.

23 So if you refuse to answer questions that I direct
24 you to answer, I could hold you in civil contempt. And that
25 means that you can be incarcerated for even longer than your

1 sentence in jail is. And the government can even bring a
2 prosecution against you for criminal contempt, and that could
3 add time to your time in jail; do you understand that?

4 **THE WITNESS:** Yep.

5 **THE COURT:** And have you talked with your lawyer
6 about what the consequences of refusing to answer the
7 questions that the Court directs you to answer might be?

8 **THE WITNESS:** Nope.

9 **THE COURT:** You didn't talk about that?

10 **THE WITNESS:** Matter of fact, I want to fire my
11 lawyer, since we're talking about lawyers.

12 **THE COURT:** What's that?

13 **THE WITNESS:** I want to fire my lawyer right now.

14 **THE COURT:** You want to fire your lawyer?

15 **THE WITNESS:** Yep.

16 **THE COURT:** Well, that's not a real wise thing to do
17 right now because you've got some legal decisions that you
18 need to make.

19 **THE WITNESS:** I'm not -- with all due respect,
20 Your Honor, I'm not the one on trial.

21 **THE COURT:** I understand that. But you do have
22 consequences to you that might result from your refusing an
23 order -- a lawful order of a Court.

24 So, as I say, I've got a job to do. And I'm ordering
25 you to answer these questions --

03:57PM 1 **THE WITNESS:** And the Court's violating my rights,
03:57PM 2 too.

03:57PM 3 **THE COURT:** No, I'm not.

03:57PM 4 **THE WITNESS:** I have the right to remain silent.

03:57PM 5 **THE COURT:** I'm not, Mr. Militello. I promise you,
03:57PM 6 I'm not. And by -- by ordering you to -- to answer the
03:57PM 7 questions, I'm not putting you in a position where you are
03:57PM 8 giving up your right to remain silent in matters that might
03:57PM 9 incriminate you, because the questions can't possibly
03:57PM 10 incriminate you.

03:57PM 11 **THE WITNESS:** I never signed into an agreement, of a
03:57PM 12 cooperation agreement with the government, so I have no
03:57PM 13 obligation to the government.

03:58PM 14 **THE COURT:** You don't have obligation to the
03:58PM 15 government. But do you have -- just listen to me. Just
03:58PM 16 listen, and don't -- just listen and don't close your mind,
03:58PM 17 okay?

03:58PM 18 You do have obligations to the Court. You might not
03:58PM 19 have obligations to the government, but you've got an
03:58PM 20 obligation to the Court.

03:58PM 21 And that means that if I order you to answer the
03:58PM 22 questions, you have to answer the questions, or there will be
03:58PM 23 consequences. And so -- and so, I'm trying to explain to you
03:58PM 24 in as respectful and as direct a way as I can that you need to
03:58PM 25 answer these questions, or there are going to be consequences

for you.

And you're not cooperating. This is by no means cooperation. It's not going to be construed as cooperation, it's not cooperation. You're here because you're compelled to be here. You're answering the questions because you're being compelled to answer the questions. So you're not cooperating.

THE WITNESS: Well, I feel my rights are being violated by the Court.

THE COURT: Okay. So regardless of what I tell you, and regardless of what the consequences are, are you just going to remain silent and not answer the government's questions?

THE WITNESS: I don't recall anything. I was high. I don't even know my name anymore. I'm a number, 22507-055, for the past 11 years because of the U.S. Attorney's Office.

THE COURT: You're not a number in this courtroom, Mr. Militello. I want you to understand that. You're not a number in this courtroom.

I told you when you came in here that you have the respect of me personally and the Court when you come in my courtroom. And anybody can tell you that anybody who comes in this courtroom gets that same respect.

THE WITNESS: I heard that about you. I heard you're fair. So --

THE COURT: Okay. So I just want to ask you this

1 question, and I want you to answer this question:

2 Even if I direct you to answer these questions, and
3 you understand that the consequences might be your spending
4 more time in jail than your sentence requires you to spend,
5 and even if, as I've explained to you, by answering the
6 questions you are not cooperating with anyone, are you still
7 just going remain silent and not answer the questions?

8 Just answer that question for me.

9 **THE WITNESS:** Yeah. I think it's in my best interest
10 to remain silent.

11 **THE COURT:** Okay. I don't know that we can do
12 anything else.

13 **MS. CHALBECK:** May the government just have one
14 moment, Your Honor?

15 **THE COURT:** Of course.

16 (Off the record.)

17 (Back on the record.)

18 **MS. CHALBECK:** The government would ask the Court to
19 hold Mr. Militello in contempt.

20 **THE COURT:** Well, I'm not going to do that right now,
21 but we'll talk about it at the end of the day. I want
22 Ms. Kubiniec to weigh in on it as well.

23 **MS. CHALBECK:** Understood, Your Honor.

24 **THE COURT:** Okay. He can leave.

25 **THE WITNESS:** Sorry, Your Honor.

04:01PM 1 (Witness excused at 4:01 p.m.)

04:01PM 2 **THE COURT:** So he's not happy with Ms. Kubiniec,
04:01PM 3 obviously. I wonder if getting another lawyer might help. I
04:01PM 4 don't know.

04:01PM 5 Ms. Kubiniec, have you -- have you had a rocky
04:01PM 6 relationship with him for a while?

04:01PM 7 **MS. KUBINIEC:** No, Your Honor.

04:01PM 8 **THE COURT:** I don't know.

04:01PM 9 **MR. COOPER:** Judge, I don't think the problem is with
04:01PM 10 Ms. Kubiniec.

04:01PM 11 **THE COURT:** I don't either.

04:01PM 12 **MR. COOPER:** I think the Court can see that for what
04:01PM 13 it was, which was an attempt to disrupt the proceeding. It
04:01PM 14 didn't reflect, and Ms. Kubiniec can speak to the fact that
04:01PM 15 she's had communications, I think frank communications with
04:01PM 16 the witness about what his responsibilities are, what the law
04:01PM 17 is. I don't think -- I think getting him another lawyer would
04:01PM 18 be giving the child throwing a tantrum what they want. It
04:01PM 19 doesn't make sense, Judge.

04:01PM 20 **THE COURT:** Okay, I don't want to just make a
04:02PM 21 knee-jerk decision. Although I am inclined to hold him civil
04:02PM 22 contempt, I don't want to make a knee-jerk decision about
04:02PM 23 that, I want to think about it.

04:02PM 24 I don't think it's going to further the purpose of
04:02PM 25 the trial doing that right now. And so give me a little time

to think about it and renew your request tomorrow --

MS. CHALBECK: Yes, Your Honor.

THE COURT: -- after I sleep on it. Okay?

(Excerpt concluded at 4:02 p.m.)

* * * * *

CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I
certify that these original notes are a true and correct
record of proceedings in the United States District Court for
the Western District of New York on February 28, 2024.

s/ Ann M. Sawyer

Ann M. Sawyer, FCRR, RPR, CRR
Official Court Reporter
U.S.D.C., W.D.N.Y.